

ADMINISTRATIVE APPEAL DECISION

DAYFIELD PROPERTIES; FILE NO. 200400050

CHICAGO DISTRICT

AUGUST 25, 2005

Review Officer: Michael G. Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Mr. Douglas Carroll, Dayfield Properties

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Appeal Meeting and Site Visit Date: 23 April 2004

Background Information: On October 10, 2003, Encap, Inc (environmental consultant for the appellant) submitted a wetland delineation report to the Chicago District (District) and requested an approved jurisdictional determination (JD) for lands owned by the appellant. The property is a vacant lot, approximately 30 acres in area, located in the Town of Plainfield, Will County, Illinois. The lot is bordered by commercial property to the north and south. U.S. Route 30 runs in a north-south direction along the western border. The Elgin Joliet and Eastern (EJ&E) railroad tracks run in a northwest-southeast direction along the eastern border of the site.

The wetland delineation report submitted by Encap identified "wetland 1" in the southeast corner of the site. Encap submitted data sheets supporting their statement that wetland 1 is a retention pond that meets the criteria for wetlands per the 1987 Corps of Engineers Wetland Delineation Manual (1987 manual). Encap also stated that wetland 1 extends off-site to the southeast into a drainage ditch excavated in upland soils (hereafter referred to as "upland drainage ditch"). The upland drainage ditch parallels the EJ&E railroad tracks. On page one of their wetland delineation report, Encap concluded that wetland 1 was connected to a creek which flows into the DuPage River, a water of the U.S.

The District performed a site visit on December 31, 2003, with representatives of Encap and Dayfield Properties. The District documented the presence of an overflow pipe that facilitates a discharge from wetland 1 into the upland drainage ditch during storm events. The District also documented a second, small corrugated pipe leading from the wetland into the same upland drainage ditch. A site location map included in Encap's delineation report (exhibit A) demonstrates that south of the project site, the EJ&E railroad intersects the West Branch of the Norman Drain (WB Norman Drain), which is shown as a tributary to the DuPage River, which is a tributary to the Des Plaines River.

On January 7, 2004, the District issued the appellant a JD letter stating that wetland 1 is a water of the U.S. and the upland drainage ditch is not. The JD and associated decision document stated

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that wetland 1 drains via a culvert to a ditch along the railroad tracks to the WB Norman Drain which is hydrologically connected to the Des Plaines River, a navigable water of the U.S.

The appellant disagrees that wetland 1 is a water of the U.S. and on February 9, 2004, submitted a Request for Appeal (RFA).

Summary of Decision: The appellant's Reason for Appeal has merit and the approved JD is remanded back to the District to include sufficient documentation to support its JD and to reconsider its JD as appropriate.

Appeal Decision Evaluation, Findings and Instructions to the Chicago District Engineer (DE):

Appeal Reason 1: The sporadic presence of water on the subject site is due to debris blockage of the drainage ditch along the EJ&E railroad tracks and is not due to historical drainage patterns.

Finding: This reason for appeal has merit.

Action: The District shall prepare and include in the administrative record a decision document that considers and discusses the current site characteristics and supports its final JD. The District shall complete these tasks within 30 days from the date of this decision, and upon completion, provide the Division office and appellant with its decision document and final JD.

Discussion: During the appeal meeting the appellant further clarified his RFA by stating that he agrees that the three wetland criteria per the 1987 manual have been met for wetland 1, and he agrees with the historic connection which the District documented. He then stated that he disagrees that the historic connection is presently valid, stating that the connection has been severed for ten to twelve years by fill activities associated with the railroad.

Documentation within the District's administrative record (JD Decision Document dated January 7, 2004; site notes dated December 31, 2003; Map 211 dated October 10, 2003; hydrologic atlas circa 1960) adequately documented the presence and position of two artificial conduits (a culvert installed between wetland 1 and the upland drainage ditch; and the upland drainage ditch) and a natural tributary (WB Norman Drain) between wetland 1 and the DuPage River. From this documentation, it is reasonable to conclude that a hydrological connection exists between wetland 1 and the Des Plaines River. However, the District did not characterize the flow within the upland drainage ditch, nor confirm that it currently functioned to convey water from the wetland to the WB Norman Drain.

During the appeal meeting, an obstruction was observed within the upland drainage ditch. The obstruction was characterized by everyone present as a berm, occupying approximately twenty feet of the upland drainage ditch. A pioneer tree (species not noted) was present on the berm and appeared about fifteen years old. Based on observations made during the appeal meeting, it is reasonable to conclude that the berm functions to obstruct the flow of surface water.

According to Corps regulations at 33 CFR 328.3(a)(5) and (7), a wetland may be considered a water of the U.S. if it is tributary to a water of the U.S. or adjacent to a water of the U.S. (other than a water that is itself a wetland). Corps regulations at 33 CFR 328.3(c) state that wetlands separated from other waters of the United States by man-made barriers are adjacent wetlands. However, the District's basis for jurisdiction does not address adjacency and is limited to determining that wetland 1 is *tributary* to a water of the U.S. In establishing that wetland 1 is tributary, the District does not acknowledge or evaluate the presence of the barrier within the upland drainage ditch. This fact, which may influence a JD, does not appear to have been considered or addressed by the District prior to its decision.

Therefore, the appellant's reason for appeal that a blockage exists within the upland drainage ditch has merit since the berm *may* preclude the existence of a tributary/valid hydrological connection by preventing surface water from flowing through the upland ditch and discharging into the WB Norman Drain.

Appeal Reason 2: The existence of the blockage and its effect on the subject site was verified on a site inspection in November 2003 by representatives of Dayfield Properties, LLC., the EJ&E railroad, and the Village Administrator of the Village of Plainfield.

Appeal Reason 3: After the site inspection, EJ&E indicated they will remove the blockage.

Appeal Reason 4: Removal of the blockage will eliminate the occurrence of water on the subject site and any presence of a tributary to an interstate water or other water of the U.S. (33 CFR 328.2(a)(5))

Finding: These related reasons for appeal do not have merit.

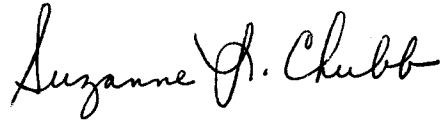
Action: No action required.

Discussion: These reasons pertain to the presence of a blockage in the upland drainage ditch that parallels the EJ&E railroad line. The blockage was not noted by the District during their December 31, 2003, site visit. As instructed under appeal reason 1, the District shall prepare and include in the administrative record a decision document that considers and discusses the current site characteristics and supports its final JD. Appeal reasons 3 and 4 are not relevant to this appeal because they pertain to anticipated actions by third parties or a predicted outcome not reflective of the conditions at the time of the District's decision. The District is not required, nor is it reasonable, to attempt to make its JD based on a predicted outcome of a potential activity. Therefore these three reasons for appeal do not have merit.

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Conclusion: For the reasons stated above, I conclude that this RFA has merit. The approved JD is remanded back to the District to include sufficient documentation to support their JD and to reconsider their JD decision as appropriate.

FOR THE COMMANDER:

A handwritten signature in black ink, reading "Suzanne L. Chubb". The signature is written in a cursive style with a large, stylized 'S' and 'C'.

SUZANNE L. CHUBB
Regulatory Program Manager
Great Lakes and Ohio River Division